State of New Hampshire
Supreme Court

NO. 2022-0483

2023 TERM

MARCH SESSION

In the Matter of Amy Froebel-Fisher
and Richard Fisher

RULE 7 APPEAL OF FINAL DECISION OF THE
NASHUA FAMILY DIVISION COURT

REPLY BRIEF

March 24, 2023

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I. Amy Preserved All Issues She Briefed

In his memorandum, Richard claims that Amy did not preserve in her notice of appeal the issue of whether she received adequate notice that the "review hearing" would actually be a divorce trial. RICHARD'S MEM. at 7. This court should reject his preservation challenge and decide this case on its merits.

This court's rules provide:

> While the statement of a question need not be worded exactly as it was in the appeal document, the question presented shall be the same as the question previously set forth in the appeal document. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

SUP.CT.R. 16(3)(b).

Question II in Amy's notice of appeal asked:

> Once the agreements were not enforced, should the court have reverted to a standard divorce proceeding, such as that envisaged in family court rules?

NOTICE OF APPEAL at 3.

The central issue in this case is that the court erred by issuing a divorce decree without a divorce trial. From the record, that error appears to have occurred for at least two reasons, as detailed in Amy's brief.

First, the notice of hearing described the upcoming proceeding as a "review hearing" rather than "divorce trial," "final hearing," "merits hearing," or something similar, thus providing Amy insufficient notice.

Second, during the "review hearing," it is apparent that the court allowed its purpose to morph. It began as a "review hearing," but somewhere about halfway through, the original purpose appears to have been abandoned; the court's questions and its subsequent order indicate that in its mind, the

proceeding was tantamount to, or had become, a divorce trial.

Although it is possible to conceptualize this appeal as two separate issues as Richard suggests, RICHARD'S MEM. at 7, the essential problem is that there was a final decree without a final hearing. Notice of an unlawful hearing is subsidiary to the actual unlawful hearing. Inadequate notice is thus fairly comprised within the court's failure to provide a divorce trial, and therefore preserved in Question II. SUP.CT.R. 16(3).

Richard cannot claim to have been surprised by Amy's argument regarding notice; Amy's motion for reconsideration, APPENDIX TO AMY'S BRIEF at 59, and the court's order on reconsideration, ADDENDUM TO AMY'S BRIEF at 66, made these connections obvious and clear. There is no requirement that notice of appeal questions must list all causes of court error, nor all grounds or legal theories on which appellant relies. *See In the Matter of Ross*, 169 N.H. 299, 301 (2016) (notice of appeal question need not explicate reasons for appellant's position); *State v. Blunt*, 164 N.H. 679, 685 (2013) (notice of appeal question need not cite law on which appellate relies). Rather, notice of appeal questions need only "apprise the opposing party and the court of the issues presented on appeal." *Town of Londonderry v. Mesiti Dev., Inc*., 168 N.H. 377, 379 (2015); *see also, State v. Thiel*, 160 N.H. 462, 464 (2010).

The reasons why a trial court's order is in error are comprised within a general notice of appeal question stating the court's alleged error. *Hillside Associates of Hollis, Inc. v. Maine Bonding & Casualty Co*., 135 N.H. 325, 330 (1992) (issue detailed in brief regarding how mutual mistake affected coverage was comprised within broad notice of appeal question alleging insurance company was obligated to supply coverage). Similarly, when this court must impliedly answer an interstitial question in order to address the stated question, the interstitial question is subsidiary to the stated question. *State v. Beauchesne*, 151 N.H. 803, 808 (2005) (question of when arrest occurs was subsidiary to

notice of appeal question of whether police had reasonable suspicion to arrest); *Samyn-D'Elia Architects v. Satter Companies of New England, Inc.*, 137 N.H. 174, 177 (1993) (status of party as intervenor was subsidiary to notice of appeal question of whether intervenor was entitled to summary judgment).

Here, Amy's notice of appeal question preserved the overarching challenge, the why of which she then briefed in detail. In order to rule on whether Amy was denied her right to a divorce trial, this court cannot avoid the subsidiary question of whether Amy was provided with adequate notice. Thus, Amy's notice of appeal question is sufficient under *Hillside, Beauchesne*, and *Samyn-D'Elia*, and Richard's preservation argument should be rejected.

Further, this court's preservation law over decades has repeatedly encouraged broad questions, rather than specific lists of component elements of error. *Town of Barrington v. Townsend*, 164 N.H. 241, 245 (2012) ("This broad question fairly encompasses the issue of whether the trial court erred in making the legal determination that the respondent's campground use violated the zoning ordinance."); *Plourde Sand & Gravel v. JGI Eastern, Inc*., 154 N.H. 791, 799 (2007) (notice of appeal question broadly asking whether economic loss is recoverable in tort preserved briefing argument that negligent misrepresentation is exception to economic loss doctrine); *LaVallie v. Simplex Wire & Cable Co.*, 135 N.H. 692, 697 (1992) ("[L]anguage of the plaintiff's questions in his notice of appeal are broad enough to encompass his constitutional claims."); *Hillside Associates*, 135 N.H. at 330.

The appellant in *In re Brittany L.*, 144 N.H. 139, 141-42 (1999), made the mistake of a too-specific notice of appeal. There, the notice of appeal question named a constitutional right to confrontation, and therefore did not include a similar issue in appellant's brief which relied on due process. *See also Dovaro 12 Atlantic, LLC v. Town of Hampton*, 158 N.H. 222, 226 (2009) (details in notice of appeal question contradicted argument in brief). The lesson of

Brittany L. and *Dovaro* is that appellants must be wary of citing specific authority in notice of appeal questions, and should pose questions broadly in a manner that can account for subsidiary issues and nuanced later arguments.

Here, in alignment with Rule 16(3)(b) and this court's encouragement of broad questions, Amy's notice of appeal stated the problem she faced – not being afforded the divorce trial the law promises – which comprises the interstitial and subsidiary question of whether invitation to a "review hearing" was sufficient notice. Accordingly, Richard's preservation objection should be rejected.[1]

[1]To support his non-preservation argument, in his memorandum Richard cites several cases, but they are inapposite. RICHARD'S MEM. at 7-8. *State v. Field*, 132 N.H. 760 (1990), involved the failure to preserve in the trial court. *State v. Blackmer*, 149 N.H. 47, 49 (2003), criticized "off-hand invocations" of constitutional rights. *Wilder v. City of Keene*, 131 N.H. 599 (1989), declined review of unspecified questions that were unmentioned in the notice of appeal. As noted, supra, *In re Brittany L.*, 144 N.H. 139 (1999), did not require listing constitutional citations in notice of appeal questions as Richard suggests, but rather distinguished between one constitutional provision cited in the notice of appeal and another argued in the brief.

II. What Occurred at "Review Hearing" is Immaterial to Adequacy of Notice

Richard continually references what was said at the hearing to defend that Amy received adequate notice. RICHARD'S MEM. at 11-13. Because notice occurs *before* a hearing, however, what was said *at* the hearing is largely immaterial to the adequacy of notice. Whether during the hearing the "judge telegraphed that he planned to issue parenting orders," RICHARD'S MEM. at 12, is similarly immaterial to adequacy of notice.

Such telegraphing may have clued Amy that the court was unlikely to side with her position, and may have also been indicative of the court having morphed the hearing away from merely a review of the parties' stipulations. But it could not have apprised anyone that there was never going to be a divorce trial.

III. Purpose of "Review Hearing" Was to Determine Status of Parties' Stipulations

Richard claims that by the time the parties arrived at the "review hearing," the court had already rejected their stipulations. RICHARD'S MEM. at 10.

However, at the hearing, the court made clear that that was not its intent. As noted in her brief, when Amy's lawyer posed that question, the court responded, "Well, I think you misread the order." *Rev.Hrg.* at 5. It is thus apparent that the court had not yet rejected the stipulations, that enforceabilty was still an open question, and that the "review hearing" was for the purpose of answering it.

Moreover, Richard conceded that, at the time of the "review hearing," the status of the parties' stipulations was still unknown. RICHARD'S MEM. at 11 (reciting that motion to grant judgment for divorce had been denied, and "review hearing" was "necessary for the parties to explain the basis of the requests"). NOTICE OF DECISION (Apr. 1, 2022), *Appx*. at 48.

IV. Amy Did Not Waive Her Right to a Divorce Trial

Richard claims that Amy received adequate notice because she put the issue of divorce before the court by asking the court to enforce the parties' stipulations. RICHARD'S MEM. at 13. This is a divorce case, so divorce was of course before the court.

Amy requesting that the court enforce the stipulations, however, does not constitute a waiver of a divorce trial. Moreover, as noted in Amy's brief, such a ruling would create a perverse disincentive for parties to avoid reaching settlements, because a rejected settlement would imply the risk of waiving trial.

Richard also claims that Amy waived her "right to have a full divorce trial" because "on at least two occasions" the court discussed the possibility of further hearings, while Amy "never indicated she wanted another hearing." RICHARD'S MEM. at 13-14.

A discussion of further hearings would not trigger a reasonable person to request further hearings, but rather would lead a reasonable party to understand that there would be further hearings. It is thus unreasonable to suggest that Amy waived her divorce trial. Moreover, a divorce litigant should be able to rely on established law and rules, which provide for a divorce trial.

Finally, as noted in her opening brief, Amy's assent to Richard filing a post-review-hearing financial affidavit does not imply waiver of trial.

V. Court's Authority to Waive Rules is not Authority to Waive Trial

Richard claims that the avoidance of a trial was occasioned by the court merely exercising its authority to waive its rules. As Richards explains, courts have authority to waive procedural requirements. RICHARD'S MEM. at 8, 15.

However, that authority is not unlimited. "[A] trial judge has the authority to determine the manner and procedure by which a case will be tried, *except where limited by statute, court rule, or constitutional fiat*." *In re G.G.*, 166 N.H. 193, 197 (2014) (emphasis added) (whether child can be compelled to testify in abuse and neglect proceeding). Even to the extent the family court has authority over its proceedings, its discretion ends when its "ruling [is] clearly untenable or unreasonable to the prejudice of [Amy's] case." *In the Matter of Peirano*, 155 N.H. 738, 750 (2007).

Here, the court did not merely relax or modify procedural requirements, but prejudicially sacrificed Amy's right to trial altogether.

VI. Abstractly Reasonable Decree is Unreasonable for Particular Parties

Richard asserts that by Amy conceding in her brief that the court's decree was "not unreasonable in the abstract," she waived her ability to object to the resulting decree. RICHARD'S MEM. at 3-4, 15.

Divorce decrees, however, are not judged by what is reasonable in the abstract, but by what is reasonable taking into consideration the particular circumstances of each case. *In the Matter of Letendre*, 149 N.H. 31, 35 (2002) ("In a divorce proceeding, marital property is not to be divided by some mechanical formula but in a manner deemed just based upon the evidence presented and the equities of the case.") (quotations omitted); *Economides v. Economides*, 116 N.H. 191, 194 (1976) ("It has consistently been the policy of this court to reject invitations to restrict trial judges by mandating the use of fixed formulas and mechanical decisional techniques in cases involving questions of divorce … and property division.… [I]n the vast majority of cases the trial judge has the problem of dividing the meager loaves and fishes without the aid of a miracle.").

What is reasonable for particular parties must necessarily reflect their goals and intents. *See, e.g., Bonneville v. Bonneville*, 142 N.H. 435, 438 (1997) (property settlements interpreted "so as to avoid future conflicts between the parties"). By imposing a property decree and parenting plan which – albeit not abstractly unreasonable for a hypothetical family – are unreasonably contrary to *these* parties' expressed intent and a poor fit for *their* circumstances, the court acted beyond its discretion.

VII. Shared Parenting Does Not Require Structured Parenting

The family court, echoed by Richard in his memorandum, suggests that "Wife, by withholding her consent, could prevent Husband from having any parenting time." RICHARD'S MEM. at 4. While that is true, again in the abstract, it does not comport with the parties' histories, their mutual respect for each other's parenting, nor their acknowledged common appreciation of the child's best interests. There is nothing in the record to support the court's concern.

Rather than allowing for the flexibility Amy and Richard obviously intended for their daughter, the court inflexibly molded them into a cookie-cutter parenting plan, without even the benefit of any evidence or testimony regarding the teenager's best interests.

CONCLUSION

This court should vacate the family court's decree, and enforce the parties' stipulations. If the parties' settlement is not upheld, this court should order the procession of a standard contested divorce case.

Respectfully submitted,

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Dated: March 24, 2023

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CERTIFICATIONS

I hereby certify that this brief contains no more than 3,000 words, exclusive of those portions which are exempted.

I further certify that on March 24, 2023, copies of the foregoing will be forwarded to the parties registered on this court's e-filing system.

Dated: March 24, 2023

Joshua L. Gordon, Esq.